

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }
RENA B. BORZAGE }

Appearances:.

For Appellant:: Charles Murstein, Attorney at Law

For Respondent: A, Ben Jacobson, Associate Tax Counsel

O P I N I O N

'This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Rena B. Borzage against proposed assessments of additional personal income tax in the amounts of \$74.13, \$72.01, \$69.90, \$67.78, \$65.66, \$63.54, \$61.43, \$59.32 and \$70.69 for the years 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958 and 1959, respectively,

On December 31, 1940, appellant Rena B. Borzage entered into an agreement with her husband, Frank Borzage, in anticipation of their subsequent divorce,

Under paragraph 1 of the agreement, entitled "Property Division," appellant received community property consisting of jewelry, two automobiles and all household furniture while Frank Borzage received the remainder of the property which, it was agreed, was equal in value to the community liabilities, which Frank Borzage assumed,

Paragraph 3 of the agreement provided that all future earnings of each party were to be his or her separate property, except that the earnings of Frank Borzage for the succeeding year were deemed community property to which appellant waived all right.

That part of the agreement which is most relevant to this appeal is as follows:

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4. Support and Maintenance of Rena B. Borzage Frank Borzage agrees, from his net income, (as hereinafter defined) to pay:

- (a) To Rena B. Boraage for her support and maintenance the sum of Twelve Hundred and Fifty Dollars (\$1,250.00) per month for a period of two years from date and the sum of One Thousand Dollars (\$1,000.00) per month thereafter until payments shall commence under the annuity policies hereinafter referred to.
- (b) To The Equitable Assurance Society of the United States and The Prudential Insurance Company of America an annual deposit or premium of Eleven Thousand Dollars (\$11,000.00) per year for a period of ten years from date, same to be and constitute an annual premium OP deposit on annuity policies for the benefit of Rena B. Borzage as annuitant, said annuity policies shall be in the form approved by the parties hereto coincident with the execution of this agreement;

* * *

The liability of Frank Borzage to make the payments provided for in sub-paragraphs (a) and (b) above shall terminate and end upon the death or remarriage of Rena B. Borzage.

Anything to the contrary herein notwithstanding, it is distinctly understood and agreed that the payments to be made by Frank Borzage as in this paragraph provided shall not exceed twenty-five per cent of his net income, ...

* * *

The payments made and to be made as provided in paragraphs (a) [and] (b) ... above are in exchange for and in consideration of the waiver of rights by Rena B. Borzage in and to community property as set forth in paragraph 3 above,

Also included in the agreement were provisions that Frank Borzage should not be liable for any payments in excess

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of those specified and that, if changed circumstances in the future should make it difficult to carry out the terms, he could petition in court for modification,

It is the nature of the annuity payments which is in dispute, Appellant did not include them in her returns for the years in question, though in prior years she had included, the monthly payments received pursuant to subparagraph (a), set forth above,

Respondent contends the annuity payments are **includible** in a **pellant's** gross income under section 17081 (formerly 17104) of the Revenue and Taxation Code. This **section provides** that:

(a) If a wife is divorced or legally separated from her husband under a decree of divorce *or* of separate maintenance, the **wife's gross income** includes periodic payments ... received *after* such decree in discharge of ... a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument **incident** to such divorce or separation,

Respondent's regulations specifically provide that the full amount of payments received by the wife under an annuity contract purchased by the husband in order to meet an alimony obligation are **includible** in the wife's income pursuant to **section 17081**. (Cal. Admin. Code, tit, 18, reg. 17081-17083(a), subd. (3)(B).)

Section 17081, however, applies **only** to payments made because of a general obligation to support, (Cal. Admin. Code, tit, 18, reg. 17081-17083(a), subd. (2)(D).) Appellant's position is that these payments are not in that class, but are for her waiver of rights in the community property.

Section 17081 of the Revenue and Taxation Code is based on section 71(a) (formerly section 22(k)) of the Internal Revenue Code. A **review** of cases interpreting the federal counterparts of our law **reveals compelling** reasons for concluding that the payments made to acquire the annuity contract, and thus the payments received by appellant under the contract, were in discharge of her husband's obligation to support her and no **& in consideration for her rights in community property.**

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Not only were the payment provisions contained in a separate paragraph of the agreement entitled "Support and Maintenance," but appellant appears to have been adequately compensated for her community property rights under other provisions. Appellant testified concerning the community property and liabilities but was uncertain as to the total amount of the debts assumed by Frank Borzage. Thus, her testimony does not negate the specification in the agreement that the debts assumed by him equalled the property which he received. Although appellant waived any right to her husband's future earnings which, for the year following the agreement were deemed community property, she received unencumbered jewelry, automobiles and furniture. This balancing of property rights under other sections of the agreement strongly inclines toward a finding that the annuity payments were made in satisfaction of the obligation to support, (Floyd H. Brown, 16 T.C. 623,) Additionally, the facts that the payments were keyed to the husband's income and that they were to cease in the event of appellant's death or remarriage are characteristic of alimony rather than payments for property rights. (Ann Hairston Ryker, 33 T.C. 924.)

The language appended to the "Support and Maintenance" section of the agreement, stating that the payments are in consideration of the waiver of rights to community property, is inconsistent with the import of the agreement as a whole. A reasonable explanation, however, lies in the fact that the California courts have established a rule against subsequent modification of a support provision which is integrated with a property settlement, except as modification is provided for in the agreement, (Plumer v. Plumer, 48 Cal. 2d 820 [313 P.2d 549].) In the Ryker case, supra, language comparable to that before us was found to have been inserted only to foreclose the California courts from thereafter modifying the support provision. Similarly, in the case before us, it appears that the language under consideration was inserted to prevent the wife from obtaining a subsequent increase in the payments. The conclusion of the Tax Court that "The substitution of another label in no way altered the basic characteristic of these-payments as alimony" is thus applicable here,

In support of her position, appellant has cited a number of cases headed by Ettlfinger v. Ettlinger, 3 Cal. 2d 172 [44 P.2d 540]. But these decisions, like the Plumer case cited above, relate to the question of whether a support provision may be modified and do not purport to interpret section 17081. As stated in Clark v. Clark, 198 Cal. App. 2d 521, 534 [17 Cal. Rptr. 652]: "Public policy favors the stability of binding contracts dividing marital property and finally settling rights and obligations of support." We have previously held

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that this line of cases is not relevant to the tax problem at hand, (Appeal of Amelia L. MacConaughy, Cal. St. Bd. of Equal., Oct. 7, 1952.) One case cited by appellant, Hilton v. McNitt, 200 Cal. App. 2d 879 [19 Cal. Rptr. 688], does not involve the modification question but the decision was based upon specific testimony which established to the court's satisfaction that the parties intended to settle only property rights. There is no such conclusive evidence here.

Based upon the authorities we have cited and the reasons we have stated, it is our view that the entire amount of annuity payments received by appellant are **includible** in her **gross** income.

ORDER

Burauant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Rena B. Borzage against proposed assessments of additional personal income tax in the amounts of \$74.13, \$72.01, \$69.90, \$67.78, \$65.66, \$630549 \$61.43, \$59.32 and \$70.69 for the years 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958 and 1959, respectively, be and the same is hereby sustained,

Done at Sacramento, California, this 23d day of June, 1964, by the State Board of Equalization.

Paul R. Leake, Chairman
Alan Cranston, Member
George J. Poulos, Member
John W. Lynch, Member
William C. Brown, Member

Attest:

[Signature] Secretary